

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REF: NO C/51 of 2018

BETWEEN:

CHARMAINE HODGE

Employee

and

KFC ANTIGUA LIMITED

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. Samuel Aymer

Member

Appearances:

Mr. Anderson E. Carty of Antigua and Barbuda Tradesmen & United Workers' Federation, Representative for the Employee

Ms. Kalisia Marks and Mr. Kemar Roberts of Richards and Company, Attorneys-at-Law for the Employer

2021: October 4

2022: February 10

JUDGMENT

Brown, P:

Introduction

1. The Employer is engaged in the business of operating at least 3 fast food restaurants in Antigua and Barbuda under the trade name KFC or Kentucky Fried Chicken. Its brand, which is well known internationally, is marketed under a franchise granted by its parent company, KFC Corporation, in the state of Kentucky in the United States of America.



2. Having commenced her employment with the Employer as a Fast Food and Customer Service Team Member on October 27, 2017, the Employee was suspended for 7 days on March 20, 2018 and was dismissed on May 3, 2018 on the ground of misconduct in the form of rude and disrespectful behaviour.
3. In these proceedings, the Employee claims that both her suspension and dismissal were unfair and resulted in loss for which she should be compensated.

The Legal Framework and Findings of Fact

4. The legal framework within which the issues of unfair suspension and unfair dismissal must be determined is established by the provisions of subsections C 58 (1) and (2), and C 59 (2), (3) and (4) of the Antigua and Barbuda Labour Code (the Labour Code). These sections provide as follows:

"C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);

(b) ...

...

Provided, however, that there is a factual basis for the assigned reason.

C 58 (2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal.

C59 (2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his employer to terminate his employment under subsection (1) but is such that the employer cannot reasonably be expected to tolerate a repetition, the employer may give the employee a written warning which shall describe the misconduct in respect of which the warning is given and state the action the employer intends to take in the event of

(a) a repetition of the misconduct; or

(b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.

(3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning.

(4) Where within six months of the receipt of the written warning under subsection (2), the employee is guilty of the same misconduct or is guilty of another misconduct in relation to his work which is as serious as the one in respect of which the written warning was given, the employer may terminate the employment of the employee or take such other action as may have been specified in the written warning."

5. Apart from the provisions of the Labour Code, the employment relationship between the parties was substantially governed by the Collective Agreement for the period October 1, 2016 to September 30, 2019 between the Employer and the Antigua and Barbuda Workers' Union, the bargaining agent for the unit of employees in which the Employee fell. The Disciplinary Code forming part of the Agreement sets out a list of offences and the corresponding sanctions for their breach. **Offence No. 13 is "Rude and disrespectful behaviour to customers, management and fellow employees"** for which the sanction is suspension on the first occasion and dismissal on the second.
6. As a franchise holder, the Employer's operations are subject to unannounced close examination for strict adherence to established "Food Safety Critical Control" policies and procedures. In the past, it had been sanctioned because it was held to be in violation of certain food safety standards, including one when a cup was left at a food preparation station.
7. When an employee claims that he was unfairly dismissed, and the employer admits that it effected the dismissal, the burden is on the employer to prove that (a) it had a "good cause" for the dismissal under section C 58 (1), and (b) that it acted reasonably under section C 58 (2). Reasonableness, which is largely a question of fact, turns on the principles of natural justice and good industrial relations, significant elements of which are embodied in the provisions of subsections C 59 (2), (3) and (4).
8. We have carefully considered the evidence of the witnesses and observed their demeanours. The preponderance of the evidence favours the Employer. In our estimation, the five witnesses for the Employer are individually more credible than the Employee. Accordingly, our findings of fact include the following:

- (a) The Employee was well aware of the relevant food safety procedures which prohibited the placement of personal non-food items in the food preparation areas.
 - (b) Prior to March 2018, as a result of its failure of food safety audits, the Employer had developed a zero-tolerance for items being left at the food preparation area contrary to the safety rules and procedures.
 - (c) On March 19, 2018, the Employee left a cup of tea unattended at the salad station section of the food preparation area.
 - (d) Upon observing the cup, the Supervisor, Crystal Isles, dutifully discarded it.
 - (e) In response, the Employee became visibly angry and loudly stated that she was "pissed".
 - (f) After the incident was reported to the Human Resources department, an investigation was carried out. The Employee was then summoned to a disciplinary hearing at which she was given the opportunity to defend herself against the allegation that she was rude and disrespectful to her supervisor.
 - (g) After hearing the Employee's explanation, the Employer concluded that the Employee was guilty of disrespectful conduct towards her supervisor and suspended her for 7 days.
 - (h) As a part of the "Employee Action Form", the suspension letter warned the Employee that "if there are any other issues of similar (sic) with disrespectful behaviour or disrespecting a supervisor or manager, team member or customer alike, you will be terminated immediately with cause".
9. Having regard to the legal framework outlined above, it is clear that the Disciplinary Code is in accord with the provisions of section C 59 (2) of the Labour Code. Moreover, the suspension letter complies with the requirements of section C 59 (3) in that it refers to the disciplinary process, identifies the offending conduct, reasonably suspends the Employee for a reasonable period and warns her of the consequences of a repetition of the same or similar misconduct.
10. In the circumstances, we are inclined to find that the suspension was not unfair because the Employer had good cause and acted reasonably.
11. As to the dismissal, from the context of the legal framework and considering the Employer's perspective, our focus at this stage is to consider whether the

Employee committed the same or a similar offence within the 6 months limited by subsection C 59 (4).

12. The suspension ended on March 28, 2018. Another incident occurred on May 2, 2018. On the same bases which grounded our earlier findings set out at paragraph 8 above in relation to the suspension, our further findings of fact are as follows:
 - (a) In an attempt to get the attention of the Employee, who was no more than 4 or 5 footsteps away, her supervisor, Lisa Richards, called out the Employee's name three times but the Employee did not respond.
 - (b) Having heard the supervisor and noting the Employee's failure to respond, another supervisor, Clavia Delsol got the attention of the Employee by also calling out her name. Ms. Richards then instructed the Employee to clean her work area by mopping the floor. In response, the Employee displayed negative body language, sucked her teeth and walked away.
 - (c) The matter was reported to the Human Resources Manager who investigated the matter by making enquiries with the said supervisors, Ms. Richards and Ms. Delsol as well as Ms. Powell, the Assistant Manager. The Human Resources Manager then convened a meeting with the Employee, in the presence of the said two supervisors and the Assistant Manager, on the same day. However, upon its commencement, the meeting was postponed to the following day on account of the Employee's raising of her voice and displaying her continuing negative attitude.
 - (d) On the following day, May 3, 2018, the postponed meeting was held. The Employee provided no credible excuse or explanation for her misconduct and continuing negative attitude. As a result, the Employer concluded that she was guilty of rude and disrespectful behaviour contrary to the Employer's standards and the Disciplinary Code.
13. Having completed of our analysis, we are inclined towards a further finding that the dismissal was not unfair, subject always to our consideration of the submissions of the parties generally and any authorities, in particular, which they provided.
14. Although learned Counsel, Ms. Marks, provided us with no case law or other authority, her closing submissions were useful in so far as they correctly emphasized critical aspects of the evidence and the applicable statutory provisions. On the other hand, contrary to the directions of the Court, Mr. Carty

omitted to file any closing submissions on behalf of the Employee. At the end of the day, there was nothing to reverse our initial inclinations stated above.

Conclusion

15. Given the nature of the Employer's business; its known standards and policies; the Disciplinary Code forming part of the Collective Agreement; the relevant provisions of the Labour Code; and the preceding chronology of facts, we find that:
- (a) The Employer had good causes for suspending and dismissing the Employee.
 - (b) The Employer acted reasonably in suspending and dismissing the Employee under the circumstances.
16. In the premises, the Employee's claim is hereby dismissed.

Dated this 10th day of February, 2022



.....
Charlesworth O.D. Brown
President



.....
Samuel Aymer
Member

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